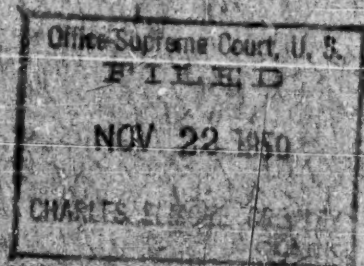


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**No. 147**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1950**

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**THE STATE OF WEST VIRGINIA, AT THE RELATION  
OF DR. N. H. DYER, ET AL., ETC., PETITIONERS**

**v.**

**EDGAR B. SIMS, AUDITOR OF THE STATE OF WEST  
VIRGINIA**

---

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF  
APPEALS OF THE STATE OF WEST VIRGINIA**

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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## **OPINIONS BELOW**

The majority opinion of the West Virginia Supreme Court of Appeals (R. 14) is reported at 58 S. E. 2d 766. The dissenting opinion (R. 32) is reported at 58 S. E. 2d at 777.

## **JURISDICTION**

The judgment of the West Virginia Supreme Court of Appeals was entered April 4, 1950 (R. 13-14). The petition for a writ of certiorari was filed June 26, 1950, and was granted October

9, 1950. The jurisdiction of the Court rests on 28 U. S. C. 1257 (3). See *infra*, pp. 17-22.

#### QUESTIONS PRESENTED

1. Whether the Ohio River Valley Water Sanitation Compact binds the signatory States in perpetuity or whether a State may withdraw by unilateral legislative action.

2. Whether, in adhering to the Compact, the Legislature of West Virginia exceeded its constitutional authority by creating a debt of the State in violation of Article X, Section 4, of the State constitution.

3. Whether, in adhering to the Compact, the Legislature exceeded its constitutional authority by invalidly delegating authority to the Ohio River Valley Water Sanitation Commission established by the Compact.

#### CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article I, Section 10, Clause 3 of the Constitution of the United States provides:

No State shall, without the Consent of Congress \* \* \* enter into any Agreement or Compact with another State \* \* \*.

2. Article X, Section 4, of the Constitution of West Virginia provides:

##### *Limitation on Contracting of State Debt*

4. No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of

the State, to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years.

3. Public Resolution No. 104, 74th Congress, approved June 8, 1936, 49 Stat. 1490, authorized the States of the Ohio River drainage basin to enter into an interstate compact for the control and abatement of stream pollution in that basin. The full text of the resolution is set forth in an Appendix to petitioners' brief.

4. Public Law 739, 76th Congress, approved July 11, 1940, 54 Stat. 752, expressly gave the consent and approval of Congress to the Ohio River Valley Water Sanitation Compact in the form in which it was ratified and enacted into law by all participating States. The full text of that Act, including the full text of the Compact, appears in an Appendix to petitioners' brief.

5. Chapter 38 of the Acts of the West Virginia Legislature, Regular Session, 1939, ratified and enacted into law the Ohio River Valley Water Sanitation Compact. The full text of that Act, excluding the text of the Compact (which is identical with the text set out in Public Law 739, 76th Congress, 54 Stat. 752) appears in an Appendix to petitioners' brief.



**STATEMENT**

This case originated in a mandamus proceeding instituted in the Supreme Court of Appeals of West Virginia by the State of West Virginia upon the relation of the Commissioners for the State of West Virginia to the Ohio River Valley Water Sanitation Commission, and the chairman and members of the West Virginia State Water Commission (R. 1, 5). The suit was brought to compel the respondent, Edgar B. Sims, the duly elected and qualified Auditor of the State of West Virginia, to honor a requisition for the issuance of a warrant upon the treasury of the State for the payment of an appropriation previously made by the West Virginia Legislature of the sum representing that State's proportionate share of the expenses of the Ohio Valley Water Sanitation Commission for the fiscal year 1949-1950. The facts are not in dispute, and for the most part appear on the face of the pleadings.

1. The Ohio River Valley Water Sanitation Compact is an interstate compact for the control and abatement of stream pollution in the Ohio River drainage basin. It has been ratified and approved by the legislatures of Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Virginia and West Virginia. Ratification and approval of the Compact was accomplished by the State of West Virginia on March 11, 1939, through the enactment of Chapter 38, Acts of

the West Virginia Legislature, Regular Session, 1939. The consent and approval of Congress was expressly given to the Compact by Public Law 739, c. 581, 76th Congress, 54 Stat. 752, approved July 11, 1940 (R. 1-2). ¶

In evidence of their ratification, adoption, and enactment into law of the Compact, that document was formally executed on behalf of each of the above-named eight States by their respective Governors and other appropriate representatives at Cincinnati, Ohio, June 30, 1948 (R. 2). Following this formal execution, the Ohio River Valley Water Sanitation Commission, which was created by the terms and provisions of the Compact, was organized and launched upon a program designed to fulfill the objectives of the Compact. The Commission consists of three Commissioners from each of the signatory States and three non-voting Commissioners representing the United States Government. These Commissioners were duly designated by the United States and the signatory States, including West Virginia, and the Commission has been functioning for some two years.

The Commission is charged with general responsibility for carrying out the provisions of the Compact. More specifically, it has authority to establish standards of water quality for the waters of the Ohio River Drainage Basin, and to issue orders against municipalities, corporations,

persons or other entities discharging wastes into such water. No such order shall be effective unless it receives the assent of at least the majority of the Commissioners from each of not less than the majority of the signatory States, including a majority of the Commissioners from the State where the person against whom the order is directed is located. In addition, the Commission has responsibility for carrying out other functions related to the purposes of the Compact, such as investigation, research, and recommendation of uniform legislation. Provision is made for appropriation by each of the signatory States of their proper proportion of the annual budget as determined by the Commission and approved by the Governors of such States, one-half of such amount to be prorated among the several States in proportion to their population and the other half in proportion to their land area within the district. Amounts so appropriated are to be applied to salaries, office, and other administrative expenses of the Commission.

2. The West Virginia Legislature at its 1949 session appropriated \$12,250, as the State's contribution to the expenses of the Commission for each of the two fiscal years beginning July 1, 1949, and July 1, 1950 (R. 2). West Virginia Acts (1949), c. 9, item 93. These appropriations represented West Virginia's proportionate share, computed in accordance with the provisions of

the Compact, of the expenses of the Commission for these two fiscal years.

Respondent, Edgar B. Sims, as Auditor of the State of West Virginia, is required to issue warrants upon the Treasury of that State before appropriations of its legislature may be paid (R. 2). On August 26, 1949, Dr. N. H. Dyer, a petitioner here and one of the relators in the proceeding below, acting in his capacity as a duly appointed and qualified commissioner representing the State of West Virginia under the Ohio River Valley Water Sanitation Compact, submitted to respondent, as State Auditor, a requisition for the issuance of a warrant authorizing payment to the Ohio River Valley Water Sanitation Commission of the above-mentioned sum appropriated by the Legislature of West Virginia (R. 3).

Respondent refused to honor this requisition, and again refused to honor such a requisition when, on two subsequent occasions, November 7, 1949, and December 22, 1949, it was resubmitted to him (R. 3).

3. The present proceedings were thereupon instituted by petitioners in the Supreme Court of Appeals of West Virginia, the highest court of the State, seeking a writ of mandamus commanding respondent to issue the requested warrant (R. 1, 5). Upon petitioners' application, the Supreme Court of Appeals issued a rule commanding respondent to appear and show cause



why the relief sought by petitioners against him should not be granted (R. 5). Upon the date set for the return of the rule, respondent appeared and filed a demurrer (R. 6-7) to petitioners' application for a writ of mandamus, and, in addition, filed an answer (R. 7-9) raising no issues of fact but which set forth various grounds upon which respondent based his refusal to honor the requisition.

Since no issues of fact had been raised, the cause was submitted to the Supreme Court of Appeals of West Virginia upon the pleadings and upon arguments and briefs of counsel (R. 12-13). By order entered April 4, 1950 (R. 13), and for reasons set forth in the opinion filed on behalf of the majority of its members (R. 14 *et seq.*), the court denied the requested writ of mandamus and dismissed petitioners' application. The court held that ratification and enactment into law of the Ohio River Valley Water Sanitation Compact by the West Virginia Legislature was an unconstitutional legislative act because it created a "debt" of the State in violation of Article X, Section 4, of the Constitution of West Virginia, and also because it delegated police power of the State (i) in perpetuity and (ii) to an agency of other States or the Federal Government or a combination of the two. Since, in the opinion of the court, the Compact was invalid, it held that the appropriation by the Legislature of West

Virginia of funds to cover the State's proportionate share of the expense of operating the Ohio River Valley Water Sanitation Commission was improper, and that therefore the respondent, as Auditor of the State, was justified in refusing to honor the requisition which had been submitted to him for the issuance of a warrant authorizing payment from the State Treasury of the sum thus appropriated.

Two of the five members of the court dissented (R. 32) on the ground that the Compact did not bind future legislatures with respect either to exercise of the police power or the making of appropriations; that it provided for exercise of police power within West Virginia only through agents of that State; that it did not create a "debt" within the meaning of the constitution of the State; and that the constitutional questions were prematurely decided since the case did not involve exercise of the police power or any effort to force future appropriations.

#### **INTEREST OF THE UNITED STATES**

The Federal Government is directly interested in the full and proper functioning of the Ohio River Valley Water Sanitation Commission, on which it is represented by three nonvoting members under the terms of the Compact. These Federal members are appointed by the President, and represent, respectively, the Public Health Service in the Federal Security Agency, the Corps of

Engineers of the United States Army, and the Fish and Wildlife Service in the Department of the Interior.

The Government's interest, however, is not confined to the fact that it participates as a member in the work of the Ohio River Valley Water Sanitation Commission. The issues raised by the decision below are of fundamental importance in the entire field of water pollution control, and this field is one of direct Federal concern. The passage of the Water Pollution Control Act, 62 Stat. 1155 (Public Law 845, 80th Congress, 2d Sess., approved June 30, 1948) established a broad program of cooperative activity between Federal and State governments and interstate agencies for eliminating or reducing pollution and improving the sanitary condition of waters. At the Federal level, the Act is administered by the Surgeon General of the Public Health Service. While the Federal Government contributes financial and technical assistance and is developing an over-all comprehensive program of water pollution control, the Act recognizes the primary rights and responsibilities of the States in dealing with the problem. The Federal Government, therefore, clearly has a legitimate interest in preserving the effectiveness of any agency through which the States are furthering the program which the Government is fostering under the Water Pollution

Control Act. And since Section 2 (b) of the Act specifically directs the Surgeon General to—

encourage cooperative activities by the States for the prevention and abatement of water pollution; encourage the enactment of uniform State laws relating to water pollution; *encourage compacts between States for the prevention and abatement of water pollution*; \* \* \* [Italics supplied.]

it is plain that the Congress has indicated a direct concern in preserving the effectiveness of just such agencies as the Ohio River Valley Water Sanitation Commission.

In the administration of the Water Pollution Control Act, moreover, the Surgeon General has maintained a close cooperative relationship with the Commission and has made grants under Section 8 (a) of the Act to the Commission and to other interstate agencies for the conduct of studies relating to water pollution caused by industrial wastes.

Finally, the Federal Government has a general interest in the preservation of interstate compacts, particularly those relating to interstate waters. In furtherance of this interest, the Government has filed supporting memoranda in this Court in previous litigation concerned with an interstate compact on water apportionment. *E. g., Hinderlider v. LaPlata Co.*, 304 U. S. 92. As was pointed out in one of these memoranda



(Memorandum on Behalf of the United States, No. 437, October Term, 1937, p. 5)—

The Federal Government, of course, is anxious that the States have the power expeditiously and effectively to arrange and to adjust the difficulties which must arise because of the territorial division of political jurisdiction within a single economic society. This interest is attested by the power given to Congress by the Constitution to approve or disapprove the compacts of the States.

#### SUMMARY OF ARGUMENT

##### I

This case involves questions of interpretation of an interstate compact approved by the Congress and the inherent powers of States to enter into such an interstate compact under the Constitution of the United States. These are issues which are properly justiciable by this Court. *Delaware River Joint Toll Bridge Comm. v. Colburn*, 310 U. S. 419, 427. Furthermore, since a controversy with respect to the meaning and validity of a contract between States is involved, the Court can decide all issues necessary to complete determination of the case, although local legislation and questions of State authorization may be involved. *Kentucky v. Indiana*, 281 U. S. 163, 176-177.

## II

The West Virginia Supreme Court of Appeals erred in interpreting the Ohio River Valley Water Sanitation Compact as binding the signatory States in perpetuity. While the Compact is silent as to termination, its revocable nature is necessarily implied from its terms and essential nature. Furthermore, such an interpretation should be adopted in order to avoid raising the constitutional questions which were the basis of the decision by the West Virginia Supreme Court.

## III

Under the foregoing interpretation of the Compact, West Virginia's adherence to the Compact clearly did not contravene any of the limitations imposed upon the State legislature.

A. No "debt" was created within the meaning of Article X, Section 4, of the State Constitution, which prohibits the "contracting" of a State "debt." Since future legislatures might provide for withdrawal from the Compact, and since no obligation could be created, even after ratification, without continuing participation and consent by the signatory States, ratification of the Compact did not create any presently-binding obligation in the nature of a debt.

B. There is likewise no invalid delegation of the State's police power. The Compact, being revocable by appropriate action by the legislature

of any signatory State, cannot be said to delegate any power in perpetuity. The powers conferred on the Ohio River Valley Water Sanitation Commission are not legislative in character but are administrative powers sufficient only to carry out the policy of the legislatures of the signatory States in accordance with standards laid down in the Compact. The Commission is the agent of all the States signatory to the Compact, and, as regards enforcement against any person in any State, the commissioners from that State constitute the sole agent of the State. Utilization of such an agency by a State for carrying out its police power functions is not improper or beyond its inherent constitutional power, and such utilization has repeatedly been made and been sustained by the courts. The decision of the West Virginia court to the contrary does not rest upon any specific provision of the West Virginia Constitution but upon limitations which it erroneously assumed to be inherent in the powers of any State in our constitutional system. This holding is not binding here, and should be rejected.

#### IV

Even if it be assumed that the Compact does not permit West Virginia to withdraw when it will, the court below erred in holding that the State could not adhere to the Compact.

A. The "debt" provision of the State Constitution is inapplicable because the Compact, and the State's ratifying Act, did not create any present obligation to pay a sum of money but, at most, made it possible that such a present obligation would arise in the future. This future obligation would vary in amount from year to year, depending on the Commission's activities, and could never arise in any year until the Commission's budget had been prepared and been approved by the Governors of all the signatory States, including West Virginia. A contingent obligation of indeterminate amount, such as this, is not a present "debt" within the meaning of the constitutional prohibition.

B. Nor is there an invalid delegation of authority. For the reasons stated above, even a grant of power to the Commission which was not revocable at will would neither violate any specific provision of the State constitution nor transgress any general principle of constitutional government.

#### ARGUMENT

The Supreme Court of Appeals of West Virginia has held that the Legislature of West Virginia in ratifying the Ohio River Valley Water Sanitation Compact exceeded its constitutional powers, and the Compact is therefore invalid



insofar as West Virginia is concerned. This decision we believe to have been made in error, an error correctible here.

At the outset, we should like to emphasize that the court's holding represents a unique attack upon the Compact. Since its inception, all parties have fully complied with its terms, and there is no suggestion that any of the participating States or the United States is dissatisfied or desires to end the agreement or to repudiate it. Not one of the signatory States (including West Virginia, whose Attorney General represents petitioners here), nor the United States, challenges the Compact's validity or binding force. Cf. *Wharton v. Wise*, 153 U. S. 155, 168, 172; *Hinderlider v. La Plata Co.*, 304 U. S. 92, 109. The sole question has come from one subordinate fiscal official of West Virginia, in a strategic position to disregard the State's legislative acts and to refuse payment of monies appropriated by the Legislature, and it is his challenge which the court below has upheld. It is not the State of West Virginia, or any of the other parties to the agreement, which seeks to invalidate the Compact. This Court is fortunately in the position, we believe, to correct the lower court's erroneous acceptance of respondent's individual attack, and to uphold the views held by the parties to the Compact.

## I

THIS CASE PROPERLY FALLS WITHIN THE JURISDICTION OF THIS COURT, AND THE COURT CAN DECIDE ALL ISSUES NECESSARY FOR FINAL DETERMINATION OF THE CASE.

A. 1. The decision of the Supreme Court of Appeals of West Virginia, that in ratifying the Ohio River Valley Water Sanitation Compact the legislature of that State exceeded its constitutional powers, necessarily involved an interpretation of the terms of the Compact itself. The court could not have reached its decision without interpreting the Compact as creating a "debt" of a signatory State; as creating an agency of other States and the Federal Government and delegating to it police power of West Virginia; as being irrevocable and perpetually binding on all signatory States; and as binding future legislatures to make appropriations for administrative expenses of the Ohio River Valley Water Sanitation Commission.

28 U. S. C. 1257 (3) provides for review of final judgments or decrees rendered by the highest court of a State

(3) By writ of certiorari, \* \* \* where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or

claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

The construction of an interstate compact, sanctioned by the Congress under Article I, Section 10, Clause 3 of the Constitution of the United States, involves a Federal "title, right, privilege or immunity" within the meaning of this section. *Delaware River Joint Toll Bridge Commission v. Colburn*, 310 U. S. 419, 427; see *Hinderlider v. La Plata Company*, 304 U. S. 92, 110. Since the decision of the West Virginia court necessarily involved substantial questions of interpretation of the Ohio River Valley Water Sanitation Compact, an interstate compact which had received the consent of Congress, this case clearly presents substantial Federal questions which are properly justiciable in this Court.

2. Furthermore, the validity of the Compact presents an issue for resolution by this Court under 28 U. S. C. 1257 (3), and in its review of the West Virginia's court's decision the Court would not be bound by the State court's determination of the meaning of the State constitution and statutes, or of the internal authority of the State to enter into the Compact. *Kentucky v. Indiana*, 281 U. S. 163, 176-7; *Virginia v. West Virginia*, 11 Wall. 39, 56; 220 U. S. 1, 28; see also *Hinderlider v. La Plata Co.*, 304 U. S. 92. In a controversy with respect to a contract between States,

the courts of one of the parties cannot be endowed with final authority to determine the validity of the agreement, or the capacity of one of the contracting parties to adhere to it. This Court must necessarily have full power and duty to determine for itself all the issues of validity and interpretation that may arise, even though they involve questions of local legislation and State authorization. *Kentucky v. Indiana, supra; Virginia v. West Virginia, supra.* While these leading cases ~~cited above~~ were ones in which the original jurisdiction of the Court was invoked in suits between States, the same principles appear applicable to the present case in view of the manifest interest of the other States who are signatories of the Ohio River Valley Water Sanitation Compact, and of the effect of the decision below upon the continued operation of that interstate agreement.<sup>1</sup>

In the comparable case of suits involving alleged impairment of the obligation of State contracts, this Court, while giving appropriate respect to the decisions of State courts on interpretation of their own statutes and constitutions, has not considered itself inexorably bound by such interpretations. In such cases, this Court has

<sup>1</sup> In *Hinderlider v. La Plata Co.*, 304 U. S. 92, 110-111, the Court expressly held that it had jurisdiction (and would exercise it) to determine the validity and effect of a compact even though the States which were parties to it were not before the Court. Like this, that case came from a State Supreme Court.

reached its own conclusions on all issues pertaining to the validity and construction of the contract. *Larson v. South Dakota*, 278 U. S. 429, 433; *Stearns v. Minnesota*, 179 U. S. 223, 232-233; *Mobile & Ohio Railroad v. Tennessee*, 153 U. S. 486, 499-503; *McCullough v. Virginia*, 172 U. S. 102, 109.

3. Finally, the case presents substantial questions under the Federal constitution as to the inherent powers of States to enter into interstate compacts of this nature with the consent of Congress. Petitioners argue that the provisions of Article I, Section 10, Clause 3 of the Constitution must be read as an affirmative grant of power to States to enter into interstate compacts, subject only to the necessity of obtaining the consent of Congress; that this provision of the Federal constitution necessarily takes precedence over all State statutes and constitutions; and that any attempt by a State, by its Constitution or otherwise, to impose further limitations on its power to enter into such compacts must fail because of conflict with the Constitution of the United States. Since we believe that the case can be disposed of in favor of petitioners without passing upon this delicate issue, we take no position as to the ultimate validity of petitioners' argument on the point. But there can be no doubt that it presents grave and fundamental questions of the proper construction of an important clause of the



Federal Constitution, and is therefore plainly within this Court's jurisdiction.

B. The title, right, privilege or immunity here asserted has been "specially set up or claimed", within the requirements of 28 U. S. C. 1257 (3). The rule is that where it clearly and unmistakably appears from the opinion of the highest court of the State in which a decision could be had that a Federal question was fully considered and a ruling on the Federal question was essential to the judgment rendered, there is sufficient compliance with the above requirement. *San Jose Land and Water Co. v. San Jose Ranch Co.*, 189 U. S. 177, 180; *Montana ex rel. Haire v. Rice*, 204 U. S. 291, 299; *Whitfield v. Ohio*, 297 U. S. 431, 435; *Charleston Association v. Alderson*, 324 U. S. 182, 185. The majority and dissenting opinions in the West Virginia court both indicate clearly that the court did in fact consider the interpretation and validity of the Compact and its judgment necessarily involved those issues.

C. Nor is there any doubt that the relators—the Commissioners for the State of West Virginia to the Ohio River Valley Water Sanitation Commission who, with the other members of that Commission, are charged with the duty of carrying out the provisions of the Compact—have an interest in this case sufficient to invoke the jurisdiction of this Court. *Coleman v. Miller*, 307 U. S. 433, 441–445. See also *Hinderlider v. La*

*Plata Company*, 304 U. S. 92; *Blodgett v. Silverman*, 277 U. S. 1.

## II

THE OHIO RIVER VALLEY WATER SANITATION COMPACT DOES NOT BIND THE SIGNATORY STATES IN PERPETUITY BUT IS REVOCABLE BY UNILATERAL LEGISLATIVE ACTION.

The State Supreme court founded its holding that the Compact is invalid, insofar as West Virginia is concerned, on the view that the Compact and the ratifying act, if valid, (1) would bind future legislatures to make appropriations for the activities of the Commission and this would amount to the creation of a debt in violation of the provisions of section 4, Article X of the Constitution of West Virginia (R. 29),<sup>2</sup> and (2) would delegate police power of the State "in perpetuity", so as to put it beyond the power of future legislatures to withdraw the delegation (R. 29, 31). The court thus indicated that it believed that the Compact is irrevocable, and that future legislatures either have no choice as to the State's continued participation in the Commission's ac-

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<sup>2</sup> This section reads as follows:

No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years.

tivities or, by withdrawal, would subject the State to a suit for damages by the other signatories. In taking this position, we believe that the court below adopted an erroneous view of the Compact, which necessarily affected its determination of the constitutional questions before it. Once that unsound interpretation of the Compact is corrected, there can be little doubt as to the resolution of the other issues in the case (see Point III, *infra*).

**A. ABSENT SPECIFIC PROVISION TO THE CONTRARY, A COMPACT OF THIS CHARACTER SHOULD BE CONSTRUED AS PERMITTING EACH SIGNATORY TO WITHDRAW**

In our view, the Compact is not irrevocable but may be abrogated by appropriate legislative action which may be taken by any signatory State unilaterally. While the Compact does not contain any express provision for termination, it nowhere expresses the intention of binding a signatory State in perpetuity, and we believe that a State contract of this type, not specifying any termination date, should not be construed as perpetually limiting the State in the exercise of its continuing governmental powers. Established principles, consistently applied in analogous circumstances, demonstrate that this construction of the Compact is the preferable one.

1. To commence with the ordinary rules of contract law, it is well settled that a contract between private parties, other than a contract of

marriage, which contemplates continuing performance for an indefinite time is not to be construed as being irrevocable. 1 Williston on Contracts, sections 38 and 39 and the cases there cited. It has been held that such contracts are terminable at will, after due notice, or after a reasonable time which must be determined as a question of fact from the apparent intention of the parties. Each of the contracting parties will ordinarily have some right of termination.

In the field of State contracts with private persons, the Court has been loath to conclude, where large public interests and governmental powers are concerned, that an agreement of indefinite duration was not terminable at will, unless there are clear words indicating that such a right of revocation was not reserved. In *Newton v. Commissioners*, 100 U. S. 548, for instance, the Court had before it an act of the legislature of Ohio establishing the Town of Canfield as the county seat of Mahoning County and a subsequent act for the removal of the county seat to Youngstown. The earlier statute required assurances from inhabitants of Canfield before the town could be "permanently established" as the county seat. It was contended that this statute created a contract, the obligation of which was impaired by the later act. The Court held that, even if the first act and the proceedings under it constituted a binding contract, the subse-

quent legislation would still not be invalid or constitute a breach of the agreement. In view of the public and governmental nature of the contract's subject matter, it could not be read as restricting the power of later legislatures or as assuming a perpetual non-terminable obligation. (Pp. 559, 561-2.)

A still more striking instance is found in *Illinois Central Railroad v. Illinois*, 146 U. S. 387. There, the Court had under consideration a grant by the State of Illinois purporting to convey to the railroad company "in perpetuity" rights in certain lands covering more than 1,000 acres underlying the harbor of Chicago. This grant was subsequently revoked by a later act of the legislature which the company attacked on the ground it impaired the obligation of its contract. The Court upheld the subsequent act revoking the grant on the ground that any action by which the legislature transferred to a private corporation dominion over so important a segment of the navigable waters of the State was "necessarily revocable" and not designed to be beyond change or rescission (pp. 455, 460-462, 466).

Moreover, compacts between States partake, in some measure, of the nature of treaties between sovereign states (see *Hinderlider v. La Plata Co.*, 304 U. S. 92, 104; *Poole v. Fleegeer*, 11 Pet. 185, 209), and aid in interpreting them can be secured from the rules of international law governing the



construction of treaties. While there is no universal agreement as to which types of treaties may be unilaterally denounced even though they contain no termination provisions, it is recognized that implication *vel non* of such a unilateral power depends on the nature and purpose of the particular treaty. The instant Compact may be likened, in its tentative character, to commercial or trade treaties which are generally thought to be terminable without mutual agreement. McNair, *The Law of Treaties* (1938), pp. 362-4, 367-8; Brierly, *Law of Nations* (1942), p. 201.<sup>3</sup>

2. Applying the foregoing principles to the Compact under consideration, it is evident, as the West Virginia court recognizes, that the Compact requires a continuing exercise of governmental functions by the signatory States. For that very reason, the West Virginia court erred in holding that the Compact, which is silent on the power of the State to terminate its adherence, necessarily involves binding obligation to continue indefinite participation, instead of construing the Compact as admitting of withdrawal at will. The

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<sup>3</sup> The law on the point may still be regarded as unsettled, but nations have also taken advantage of such doctrines as that of "*rebus sic stantibus*" in order to escape from burdensome treaty obligations, especially where it is claimed that the circumstances under which the treaties were first entered have changed. See, e. g., Bullington, *International Treaties and the Clause "Rebus sic Stantibus"* (1927), 76 U. Pa. L. Rev. 153; Moore, *Digest of International Law* (1906), sec. 770-780; 5 Hackworth, *Digest of International Law* (1943), sec. 511.

very considerations recognized by the West Virginia court—the importance of maintaining continuing authority in the legislature to regulate activities bearing on the public welfare as circumstances may require; the freedom from past commitments which each legislature should have in dealing with regulatory problems facing it at that particular time—emphasize, we believe, that the signatory States did not intend to bind themselves in perpetuity to the continuing exercise of their police powers as the Compact directs. If a signatory State should decide, after some time, that its pollution difficulties were increased rather than decreased by operations under the Compact, it would be free to withdraw and adopt some other solution; the State could, by appropriate legislative action revoking the Compact as it relates to it, relieve itself of the necessity of continuing to exercise these governmental functions in the particular way required by the Compact. Moreover, the nature of the Compact, calling for continuing cooperation among the signatory States, furnishes another reason why the lower court's interpretation is improbable. Cooperation generally rests on continuing, and not enforced, consent.

The specific language of the Compact, in Article VII supports this position. Article VII provides:

Nothing in this compact shall be construed to limit the powers of any signatory

State, or to repeal or prevent the enactment of any legislation or the enforcement of any requirement by any signatory State, imposing additional conditions and restrictions to further lessen or prevent the pollution of waters within its jurisdiction.

The plain meaning of the first clause of the foregoing sentence appears to be to reserve complete freedom of action to subsequent legislatures to take such action as they may deem necessary with regard to exercise of police power, making appropriations, or any other governmental function. On this point we believe that the dissenting opinion below of Judge Given correctly interpreted the Compact. Judge Given said (R. 34):

Does the compact in effect bind in any manner future Legislatures of this State, or does the compact grant any power or right in perpetuity? Article VII of the compact provides: "Nothing in this compact shall be construed to limit the powers of any signatory State. \* \* \*." In the face of this clear reservation to "any signatory State" of the "powers" of such state, I cannot believe that the intention to grant, in perpetuity, any power whether the police power or the power to make appropriations, can be read into the compact. The plain meaning of the language seems to be that the compact shall be so construed that no limit shall be placed upon any power

of any signatory state as to any future action thereof. If this be correct, then there is no granting of any police power or any other power, in perpetuity, and no future Legislature is bound or attempted to be bound as to any such police power or as to the making of any future appropriation.

3. Another weighty and, we believe, decisive argument favors the interpretation of the Compact outlined above:—application of the firmly established canon that wherever possible an act of a legislature will be given an interpretation which will avoid unconstitutionality or even the raising of serious constitutional questions. The opinion of the Supreme Court of Appeals of West Virginia points to serious State constitutional questions as to the validity of the Compact and of the ratifying act of the West Virginia Legislature, if they are construed to be binding upon the State in perpetuity.\* These questions are not presented if the Compact is construed as leaving the legislature of the State free to take such action in the future as it may deem necessary and appropriate for the carrying out of its police power and appropriation functions. As we have pointed out, the Compact itself is silent on the point of duration, and a construction making it unilater-

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\*The same questions are probably presented under the Constitutions of the other signatory States. See *infra*, pp. 53-54, 57-60.

ally revocable by appropriate legislative action is reasonable and is grounded both in the Compact's terms and in the principles applicable to agreements of this type.<sup>5</sup>

4. It is true that this Court has in some cases held that States may not enact subsequent legislation inconsistent with, or withdrawing from, previous interstate compacts. *Greene v. Biddle*, 8 Wheat. 1; *Virginia v. West Virginia*, 11 Wall. 39. Analysis of these cases, however, demonstrates their dissimilarity to the one now before the Court, in that they involved the protection of rights which had vested as a result of interstate compacts. None of these cases involved the continuing exercise of governmental powers, unrelated to private property rights. Thus, in *Greene v. Biddle*, *supra*, this Court considered the validity of a Kentucky statute purporting to vest title to land in a class of individuals. The Court held the statute unconstitutional as impairing the obligation of a contract, in that the title to these lands had already vested in other persons pursuant to an interstate compact between Kentucky and Virginia. This case clearly involved no determination that the State of Kentucky or any other State could not with-

<sup>5</sup> It is well established that treaties, a comparable form of agreement, should be liberally construed to effectuate the intent of the parties. *Bacardi Corp. of America v. Domenech*, 311 U. S. 150, 163; *Valentine v. U. S. ex rel Neidecker*, 299 U. S. 5, 10; *Jordan v. Tashiro*, 278 U. S. 123, 127-30.



draw from compacts calling for continuing exercise of governmental powers where vested rights are not affected. In subsequent cases dealing with the same compact, this Court refused to extend the implications in its decision of *Greene v. Biddle* beyond the circumstances of that particular case. *Hawkins v. Barney's Lessee*, 5 Pet. 457; *Kentucky Union v. Kentucky*, 219 U. S. 140.<sup>a</sup>

B. NO PROVISION OF THE COMPACT REQUIRES THAT IT BE  
CONSTRUED AS BARRING WITHDRAWAL.

None of the specific provisions of the Compact imply that a signatory is barred from withdrawing. Article X provides for appropriations by the participating States,<sup>7</sup> but it obviously applies

<sup>a</sup> Moreover, this Court has even upheld State action on matters within the scope of its powers as a sovereign State, although contrary to a stipulation incorporated in the Federal enabling act for its admission to the Union which was concurred in by the State at the time of entry. *Coyle v. Oklahoma*, 221 U. S. 559.

<sup>7</sup> Article X reads as follows:

The signatory States agree to appropriate for the salaries, office and other administrative expenses, their proper proportion of the annual budget as determined by the Commission and approved by the Governors of the signatory States, one-half of such amount to be prorated among the several States in proportion to their population within the District at the last preceding federal census, the other half to be prorated in proportion to their land area within the District.

This Article should be read in connection with certain paragraphs contained in Article V, as follows:

The Commission shall submit to the Governor of each State, at such time as he may request, a budget of its

only so long as the State is a party to the Compact and a member of the Ohio River Valley Water Sanitation Commission. Articles VI and IX, containing the regulatory provisions, are likewise applicable only so long as a State maintains its adherence to the agreement. And if Article XI, governing the coming into effect of the Compact,<sup>8</sup> is at all relevant to the issue of termination, it carries the affirmative implication that a State may withdraw, since it expressly provides that the Compact can be effective and the Commission operate with less or more members than the original signatories. All the other Articles of the Compact are similarly consistent with a purpose to permit withdrawal by unilateral action.

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estimated expenditures for such period as may be required by the laws of such State for presentation to the legislature thereof.

\* \* \* \* \*

The Commission shall not incur any obligations of any kind prior to the making of appropriations adequate to meet the same; nor shall the Commission pledge the credit of any of the signatory States, except by and with the authority of the legislature thereof.

<sup>8</sup> Article XI reads:

This compact shall become effective upon ratification by the legislature of a majority of the States located within the District [i. e., the signatory States] and upon approval by the Congress of the United States; and shall become effective as to any additional States signing thereafter at the time of such signing.

## III

IF THE COMPACT PERMITS WEST VIRGINIA TO WITHDRAW WHENEVER ITS LEGISLATURE SO DETERMINES, ADHERENCE TO THE COMPACT CLEARLY DOES NOT CONTRAVENE ANY LIMITATION BINDING ON THE STATE

If the Compact be read, as we urge in Point II, to permit unilateral withdrawal by any of the signatory states, there can be no doubt that the Compact and implementing state legislation are entirely consistent with the provisions of the West Virginia Constitution to which the court below adverted, and plainly within all the limitations on the State which the court invoked, and there is, therefore, no basis for respondent's refusal to allow the appropriated monies to be paid over. There is no indication that the State Supreme Court, had it read the Compact correctly, would have disagreed with this conclusion, but, in any case, we believe (as stated *supra*, pp. 18-20), that this Court is free, in this proceeding, to construe the State Constitution independently.

A. NO PROHIBITED "DEBT" IS CREATED.

Article X, section 4, of the State Constitution, (*supra*, pp. 2-3) prohibits the contracting by the State of a "debt" except for five designated purposes, none of which would cover the present Compact's aims. The State Supreme Court thought that since the Compact, in its view, bound future legislatures to make appropriations for

the continuation of the Commission's activities, the Compact necessarily created a forbidden "debt" (R. 29). If, however, future legislatures are not so bound, the infirmity in the State's adherence to the Compact which the State court deemed to exist would be completely removed. For the State can hardly be said to have "contracted" a "debt", in any proper sense, if the obligation to appropriate the State's *pro rata* share of the Commission's annual expenses can be terminated for the future by withdrawal from the Compact. Appropriations for the Commission are then on exactly the same basis as those necessary to meet the State's other current expenses.<sup>9</sup>

It may be noted, in addition, that the State's obligation to make payment is further qualified in a manner showing that it is not equivalent to the "contracting" of a "debt". Article X of the Compact (fn. 7; *supra*, p. 31), requires the Commission's annual budget to be "approved by the Governors of the signatory States" and provides for State appropriations only after the budget is approved; and Article V (fn. 7; *supra*,

<sup>9</sup> Article V of the Compact prohibits the Commission from incurring "any obligations of any kind prior to the making of appropriations adequate to meet the same", and requires it to "submit to the Governor of each State, at such time as he may request, a budget of its estimated expenditures for such period as may be required by the laws of such State for presentation to the legislature thereof (see fn. 7, *supra*, pp. 31-32).

pp. 31-32) requires the Commission to submit its budget to each Governor at the time he requests, and forbids it from incurring any obligation prior to the making, by the signatory States, of appropriations adequate to cover the obligation. Continuous participation and consent on the part of each of the signatories to the incurring of every Commission obligation is thus assured at all times.

In short, if a signatory State has power to terminate its adherence to the Compact and thus prevent the arising of any obligation in the future, and if, even in the absence of such action of termination, the creation and extent of the State's obligation depends on affirmative action and review by the Chief Executive of the State, it must follow that the Compact does not amount to the "contracting" of a prohibited "debt". Perhaps the most significant confirmation of the correctness of this position is the fact that the Constitutions of most of the other signatory States contain similar debt provisions, for it is, of course, most improbable that the Compact's negotiators and the ratifying legislatures would have agreed to violate their own fundamental laws. See *infra*, pp. 53-54, 57-60.

B. THE "POLICE POWER" OF THE STATE IS NOT INVALIDLY  
DELEGATED.

The Supreme Court of Appeals also held that the State act approving and enacting the Compact into law was unconstitutional because it



delegated police power of the State in perpetuity and to an agency of other States and the Federal Government. The court did not refer to any specific provisions of the State constitution but based its position on general principles of constitutional law, which would, if valid, be applicable to any State within our constitutional system. It construed the Compact as alienating a basic legislative power of the State beyond the control of the legislature. The court said (R. 29, 30-31) :

We think a reading of the compact creating such commission will disclose that this State has delegated and vested in such commission, *in perpetuity*, a substantial part of its police power, so far as that power relates to the control of our streams, which power may be exercised by the said commission as a whole, and by which, with one exception to be hereafter noted, can if so desired be controlled and used by commissioners from other States in conjunction with commissioners appointed by the Federal Government.

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By common sense and necessity, the use of the police power of the State is vested in that branch of the government through which the people speak, namely, the Legislature; but it is a power, which, being within legislative control, cannot be *permanently* bartered away or alienated by any

one Legislature. It is a power which must always remain in existence, and subject to legislative use when necessity arises. This being true, when a Legislature undertakes to delegate to any citizen, any municipality, or any other agency of the government inside the State, *in perpetuity*, or attempts to make a compact with another state or states, or with the Federal Government, by which it so delegates a part of its police power to be used within this state or outside this state, it attempts to do something which it does not possess the power to do. While it possesses the power to delegate the police power to governmental agencies within the State, it does not, in our opinion, possess the power to delegate any portion of that power to another state or to the Federal Government or to a combination of the two. [Italics added.]

For the reasons outlined below, we believe the court erred in this holding.

1. If the compact does not bind the future legislatures of signatory States but is revocable by appropriate legislative action, it is clear that, even if police power were delegated by the Compact, it was not delegated in perpetuity and the legislature has not abandoned the right to control its future exercise. The first ground of the West Virginia court's holding, therefore, cannot be sustained under a proper interpretation of the Compact.

2. The court below does not appear to hold that the Compact improperly confers "legislative" powers on the Commission, but we should, nevertheless, like to make it clear that the powers granted by the Compact are merely such as are customarily conferred on administrative agencies of State governments. In general, these powers consist of those appropriate for administration of a water pollution control program in the Ohio River Valley. Insofar as they relate to the "police power", they consist of the setting of standards of water quality and promulgation of rules and regulations under Article VI, and the issuance and enforcement of pollution abatement orders under Article IX. In addition, the Commission is directed, in Article VIII, to conduct studies, investigations and research, make recommendations for uniform legislation and consult with appropriate agencies on pollution problems. Article I states the underlying legislative policy of maintaining the waters of the Ohio River Basin in a satisfactory sanitary condition for all legitimate uses, and standards are prescribed for establishment of standards of water quality in the waters of the basin.

From the foregoing, it is clear that the Compact does not attempt to delegate any "legislative" power to the Commission. Rather, it states a general policy and establishes standards, within the framework of which the Commission is given

administrative powers sufficient to carry out the policy. In this respect, the Compact is similar to a large number of State statutes conferring powers at least equally broad on agencies charged with responsibility for administration of water pollution control programs within particular States. Specifically, they do not differ substantially from those of the State Water Commission of West Virginia under the water pollution control act of that State. West Virginia Code (1949), sections 1401-1409 (6/7). Indeed, the powers of the Ohio River Valley Water Sanitation Commission are less than those possessed by a large number of State agencies in that they do not include the power to issue permits as a condition precedent to the discharge of wastes into waters under the Commission's jurisdiction.

We have found no decision holding that conferring of such powers on administrative agencies results in unconstitutional delegation of legislative authority. Broader delegations than this have been sustained by the Supreme Court of Appeals of West Virginia. *State v. Buhner*, 126 W. Va. 280, 27 S. E. 2d 823; *West Central Producers Cooperative v. Commissioner*, 124 W. Va. 81, 20 S. E. 2d 797. The West Virginia court has likewise had occasion to consider the water pollution control act of that State and has not suggested that the Act might be considered invalid on this ground. *Danielley v. City of Princeton*, 113 W. Va. 252, 167 S. E. 620.

3. As stated above, the opinion of the West Virginia Supreme Court of Appeals contains nothing contrary to the foregoing contention that the Commission possesses powers no broader than those customarily vested in State administrative agencies. The West Virginia court apparently found a ground of distinction, however, in the fact that the powers given to the Commission were created by an interstate compact rather than by the statute of a single State and were conferred on an interstate agency rather than on an integral part of a State government.<sup>10</sup> The distinction is valid only if (i) the Commission as established under the Compact is not an agency of any signatory State but is separate and apart from each of them, and (ii) the legislatures of these States cannot utilize such an administrative agency to control water pollution problems common to each of them. Neither proposition appears to us to be tenable.

(a) The Ohio River Valley Water Sanitation Commission is not an entity separate and apart

Because of its stress on the alleged delegation of powers "permanently" and "in perpetuity" (*supra*, pp. 36-37), we are not certain that the court below would have rendered the same decision on the "delegation of police power" point if it had read the Compact as we suggest in Point II, *supra*. It may very well be that the court's entire discussion of this point rests on its view that the Compact bound the State permanently, but we treat the argument as if the court held that the State could not delegate any functions to the Commission even though the State could withdraw from the Compact and the Commission at any time.



from the signatory States but is the agency of each of them. Through this agency the States of the Ohio River Basin accomplish, in the language of the preamble of the Compact, "the control of future pollution and the abatement of existing pollution in the waters of said basin \* \* \* through the cooperation of the States situated therein, by and through a joint or common agency."

The Commission is made up of representatives of each of the various States "chosen in the manner and for the terms provided by the laws of the States from which they shall be appointed," and it is further provided that "any commissioner may be removed or suspended from office as provided by the law of the State from which he shall be appointed."

#### Article IV:

In enforcement proceedings against any person in West Virginia, the Commission is bound by the following provision of Article IX of the Compact:

No such order shall go into effect unless and until it receives the assent of at least a majority of the commissioners from each of not less than a majority of the signatory States; and no such order upon a municipality, corporation, person or entity in any State shall go into effect *unless and until it receives the assent of not less than a majority of the commissioners from such state.* [Italics supplied.]

Thus, regardless of the powers and duties which may have been conferred upon the Commission as a whole, the enforcement power with respect to citizens of any particular State has been retained in the hands of the Commissioners from that State. Such Commissioners are appointed pursuant to the laws of the State and may be removed as provided in the laws of the State.<sup>11</sup> (The West Virginia act ratifying the Compact provided for removal of the West Virginia Commissioners by the Governor of that State.) They are thus accountable to their own States rather than to the Commission as a whole which has no power to take action against them in any way. It follows that the Commission, at least insofar as its regulatory functions affect the citizens of West Virginia, must be considered to be an agency of the State of West Virginia. The police power of the State, therefore, is retained in an agency of the State. Accordingly, we do not believe, ~~therefore~~, that the West Virginia court was correct in describing the Compact as delegating a portion of the State's police power "to another state or to the Federal Government or to a

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<sup>11</sup> Article IV of the Compact provides, in part:

The commissioners from each State shall be chosen in the manner and for the terms provided by the laws of the States from which they shall be appointed, and any commissioner may be removed or suspended from office as provided by the law of the State from which he shall be appointed.

combination of the two." Rather, the Compact creates a "joint or common agency" of each and all of the States signatory thereto.

(b) That the legislature of West Virginia may utilize such an agency to accomplish proper purposes, such as control of water pollution, should not be doubted. "The power to contract and the power to select appropriate agencies and instrumentalities for the execution of state policy are attributes of state sovereignty. They are not lost by their exercise." *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 526. In our federated system of government, the several States, while in many respects sovereign, are bound together in a single political entity and by closely intermeshed economic and social relationships. They must necessarily have power to take cooperative action in solution of their common problems and to make use of appropriate agencies to make such cooperation effective.

Pursuant to this principle, States have by compact given agents of another State police authority within their territory. A striking example of this is the long-standing compact between New York and New Jersey concerning jurisdiction over the Hudson River. Compact of June 28, 1834, 4 Stat. 708. In 1834, the two States agreed, with the consent of Congress, that the boundary between them should be located in the middle of the river. It

was further agreed, however, that with certain specified exceptions the State of New York should have exclusive jurisdiction over the entire river up to the New Jersey shore. This provision has been interpreted by the courts of both States as conferring jurisdiction on the State of New York over the entire river, including that portion lying on the New Jersey side of the territorial boundary, for purposes of police control and the applicability of New York penal statutes. *Ferguson v. Ross*, 126 N. Y. 459, 27 N. E. 954; *People v. Central Railroad Co. of New Jersey*, 42 N. Y. 283; *State v. Babcock*, 30 N. J. L. 29. This Court, while not passing directly on the question of penal jurisdiction, has indicated that it would follow the views of the New York and New Jersey courts in the interpretation of this compact. See *Central Railroad Co. v. Jersey City*, 209 U. S. 473, 479. The famous Port of New York Authority is another example of cooperative action between New York and New Jersey—this time through a special joint agency. 42 Stat. 174, 822.

In numerous other instances, the courts have sustained the power of the States by compact to provide for cooperative action in the exercise of their police power. Thus, where an interstate compact gave Kentucky and Indiana concurrent jurisdiction over the Ohio River for service of process, this Court sustained the validity of serv-

ice by Indiana officials on the Kentucky side of the boundary between the two States. *Wedding v. Meyler*, 192 U. S. 573; cf. *Central Railroad Co. v. Jersey City*, 209 U. S. 473. Cases arising under the Interstate Compact for Supervision of Parolees and Probationers have recognized the right of a State, through its representatives, to enter another State and remove therefrom an individual on parole from a sentence of imprisonment in the former State. *Ex parte Tenner*, 20 Cal. 2d 670, 128 P. 2d 338; *Gulley v. Apple*, 213 Ark. 350, 210 S. W. 2d 514. That compact received the assent of Congress in 1934 in an act authorizing "any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts." Act of June 6, 1934, 48 Stat. 909, 18 U. S. C. 420. Forty-five States, including West Virginia, have now ratified the Interstate Compact for Supervision of Parolees and Probationers. Council of State Governments, *Book of the States*, 1950-51, p. 45.

States have also entrusted administrative responsibilities to agencies of the Federal Government, and their power to do so has been upheld. *Ex parte Lasswell*, 1 Cal. App. 2d 183, 36 P. 2d



678; *Underwood Typewriter Co. v. Chamberlain*, 94 Conn. 47, 108 Atl. 154. Indeed, on occasion, States have even entrusted private bodies, sometimes corporations organized in other States, with the exercise of administrative functions relating to the police power. *Nicchia v. New York*, 254 U. S. 228; *Ex parte Gerino*, 143 Cal. 412, 77 P. 166; *Whaley v. State*, 168 Ala. 152, 52 S. 941. If a State may confer such powers on private associations, *a fortiori* it may give them to a public body established by statute as a joint agency of the State and other States.

In this connection, it may be noted that section 2869 of the West Virginia Code of 1949 limits the practice of medicine to persons graduating from class "A" medical schools, as classified by the Council on Medical Education and Hospitals of the American Medical Association and other professional associations. The Board of Medical Examiners of West Virginia is likewise authorized by this statute to waive the requirement of examination before the Board and accept in lieu thereof a certificate from the National Board of Medical Examiners or the licensing agency of another State or of a foreign country. This act has been upheld by the Supreme Court of Appeals of West Virginia as a valid exercise of the State's police power. *State v. Morrison*, 98 W. Va. 289, 127 S. E. 75; *Thomas v. State Board of Health*, 72 W. Va. 776, 79 S. E. 725.

Control of pollution of our great rivers presents an instance peculiarly appropriate for interstate cooperation. Because of the interstate nature of these streams and the effect of upstream waste discharges on downstream waters, action by individual States, acting alone, cannot correct the evils of pollution. This was recognized by this Court, speaking through Mr. Justice Clarke, in *New York v. New Jersey*, 256 U. S. 296, 313, in the following language:

We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted.

The most effective means of securing such cooperation is through the establishment of an interstate agency such as the Ohio River Valley Water Sanitation Commission. This is attested by the large number of interstate agencies that have been created in this field. Beside the one here in controversy, reference may be made to the Interstate Commission on the Potomac River Basin, the New England Interstate Water Pollution Control Commission, and the Interstate Sanitation Com-

mission dealing with waters of Long Island Sound and New York Bay.<sup>12</sup> The validity of agreements establishing these agencies, as well as all other agreements between States for cooperative exercise of police power, will be cast in doubt if the decision of the West Virginia court stands. That court did not base its decision on provisions peculiar to the constitution of that State. Rather, it relied on general principles as to what it conceived to be the inherent limitations on the power of the legislature of any State in the Union. If its decision is sound as to West Virginia, it is equally applicable to all other States.

For the reasons stated above, we do not believe that the West Virginia court's decision is sound as to West Virginia or any other State. The Compact did not divest the signatory States of any police power. On the contrary, in Article VII it specifically reserved to the States complete freedom of action in the future.<sup>13</sup> What the Compact did was merely to establish a "joint and

<sup>12</sup> The policy of Congress, as expressed in section 2 (b) of the Water Pollution Control Act, 62 Stat. 1155, is expressly to encourage interstate compacts in this field.

<sup>13</sup> Article VII provides:

Nothing in this compact shall be construed to limit the powers of any signatory State, or to repeal or prevent the enactment of any legislation or the enforcement of any requirement by any signatory State, imposing additional conditions and restrictions to further lessen or prevent the pollution of waters within its jurisdiction.

common agency" of all the States through which they might cooperate in carrying out a common purpose. Nothing in the constitution of West Virginia or in the Constitution of the United States forbids the State to make such use of such an agency. In invalidating West Virginia's adherence to the Compact, the court below misconceived the structure of, and the limitations imposed upon, the State's government under our federal form of polity. That misconception this Court is free to correct, in determining West Virginia's obligations and the other States' rights under the Compact.

#### IV

EVEN IF THE COMPACT DOES NOT PERMIT READY WITHDRAWAL, WEST VIRGINIA MAY VALIDLY ADHERE TO IT

Though resolution of the State law issues dealt with by the court below is somewhat more difficult if it be assumed that the Compact bars withdrawal at will, we submit that even on that construction West Virginia's adherence was valid. We assume, in this Point, that the Compact has some period of compulsory duration (which need not now be definitely determined), and that a State may not, therefore, withdraw at will, but may properly withdraw (absent repudiation or serious breach by the other parties) only after, for example, some reasonable period of operation, or upon a sufficient change of cir-

cumstances warranting invocation of some equivalent of the doctrine of "*rebus sic stantibus*" in international law."<sup>14</sup>

Even on this reading of the Compact, the lower court's unique view that West Virginia is powerless to join is erroneous, and it should not be permitted to prevail in this suit testing the validity of the State's adherence. This Court can, and should, hold that West Virginia has full capacity to ratify the Compact and to perform the resulting obligations.

A. "*Debt.*"—Article X, section 4, of the State Constitution in terms prohibits no more than the "contracting" by the State of a "debt." *Supra*, pp. 2-3. At most, the Compact creates not a present "debt" but a future and contingent obligation, dependent upon the extent of the Commission's activities each year and the budget approved by the Governors of the participating States. The sums West Virginia may be called upon to appropriate can vary from zero—in a year of complete inactivity—up to whatever amount West Virginia's Governor will approve in a particular year. As we have pointed out (*supra*, pp. 33-35), (1) the Commission's annual budget must always be "approved by the Governors of the signatory States" (Article X),

<sup>14</sup> We believe it highly unlikely that the Compact can be read as perpetual in duration, and binding on the parties for all time or until they all agree to rescind it.



including the Governor of West Virginia, (2) no appropriation need be made by the State until the budget is approved (Article X), and (3) the Commission may not "incur any obligations of any kind prior to the making of appropriations adequate to meet the same" (Article V). There is, therefore, no definite sum which is now owing from West Virginia to the Commission on account of the Commission's future activities. There can be no more, now or at any other time, than a present obligation on the State to pay its share of the expenses of such activities as the Commission may undertake in the future, while West Virginia is still a member, and with the express approval, at all times, of West Virginia's Governor.

Such a future and contingent obligation does not constitute a "debt" within the meaning of constitutional provisions such as Article X, section 4. There is a traditional difference between a debt and a contract for future indebtedness. As this Court observed in *Walla Walla v. Walla Walla Water Company*, 172 U. S. 1, 20:

There is a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party perform the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as by the issue of railway bonds, or for the erection of a public improvement, though such debt

be payable in the future by installments. In the one case the indebtedness is not created until the consideration has been furnished; in the other the debt is created at once, the time of payment being only postponed.

See also *Williams v. City of Raceland*, 245 Ky. 212, 53 S. W. 2d 370. Similarly, an indeterminate and indefinite liability, whose amount cannot be ascertained until the occurrence of some future event, has been held not to constitute a "debt" within the meaning of constitutional debt limitations comparable to that here involved. *City of Chicago v. Galpin*, 183 Ill. 399, 55 N. E. 731; *City of Oakland v. Williams*, 15 Cal. 2d 542, 103 P. 2d 168.

Decisions of the court below, construing the debt provisions of the West Virginia Constitution, have been consistent with these principles. That court has repeatedly upheld the validity of long-term commitments by municipalities to pay for the furnishing of public services, such as light and water, in spite of the provisions of Article X, Section 8, of the State constitution limiting the incurring of indebtedness by municipalities. *Allison v. City of Chester*, 69 W. Va. 533, 72 S. E. 472; *Appalachian Electric Power Company v. State Road Commission*, 117 W. Va. 200, 203, 185 S. E. 223. Moreover, the constitutional prohibition against incurring of debts by the State has

not been interpreted to prevent the legislature from providing for appointment of State officials at specified salaries for terms of years covering sessions of several successive legislatures. See *Blue v. Tetrick*, 69 W. Va. 742, 72 S. E. 1033; W. Va. Code (1949) Secs. 654, 2547. Such statutes could not be sustained under the debt provisions unless the State constitution is interpreted as permitting the legislature to subject the State to possible future financial obligations.

Any doubts which would be raised by Article X of the State Constitution as to the ability of the State to adhere to the Compact, if construed not to be revocable at will, should be resolved by noting that the constitutions of each of the signatory States contain restrictions on the contracting of debts by the legislature which might cast doubt upon the power of the State to ratify the Compact if ratification of the Compact amounted to the contracting of a debt. In the case of Pennsylvania, Virginia, Ohio, Indiana, and Kentucky, particularly, the provisions of the State constitutions, in their pertinent part, closely resemble those of section 4, Article X, of the West Virginia Constitution. See Appendix, *infra*, pp. 57-60. It must be assumed that the negotiating commissioners appointed by the Governors of the respective States, as well as the ratifying legislatures, were not without knowledge of these existing con-

stitutional limitations on their several States. Indeed, both Article X and Article V of the Compact reflect a lively respect for State fiscal processes and concern to prevent the arising of actual obligations, either on the part of the Commission or of the signatory States, in the absence of continuing State action and consent.

B. "*Delegation of Police Power*"—Our previous discussion (*supra*, pp. 38-49) of the lower court's holding as to delegation of authority, though it assumes that the Compact permits easy unilateral withdrawal, equally demonstrates the error in the holding below on this point, even on the view that West Virginia cannot withdraw as freely as we believe. As we have shown, the powers granted to the Commission are sufficiently circumscribed and guarded (*supra*, pp. 38-39). And the Commission is clearly an agency of the State, which cannot ~~take~~ enforcement action against West Virginians, or other persons within the State's territory, without the concurrence of a majority of West Virginia's own Commissioners, whose appointments and terms are computed under Article IV of the Compact (*supra*, pp. 40-49).

We know of nothing in the West Virginia constitution, or in the general principles on which American governments are founded, which pro-

hibits the State from agreeing to make such limited use, for a term, of an agency like the Ohio River Valley Water Sanitation Commission. The New York-New Jersey compact of 1834 has been in effect for over a century, and the Port of New York Authority has functioned since the early 1920's, without serious question. See *supra*, pp. 43-44. The La Plata River Compact between Colorado and New Mexico, in effect since 1925, providing only for modification or termination by mutual consent, set up a joint board of State Engineers for administration. *Hinderlider v. La Plata Co.*, 304 U. S. 92, 97, 109. The Virginia-Maryland compact of March 28, 1785 (the subject of *Wharton v. Wise*, 153 U. S. 155), allocating jurisdiction between the two States and expressly providing against unilateral revocation, is, we believe, still in effect. As these examples indicate, the teaching of actual practice is that, at the very least, restricted delegations of powers to interstate agencies (or to other States) of the type involved here are fully valid. It is plain that the Compact Clause of the Constitution would have very little scope, and interstate cooperation would be still-born, if the States were not free to provide for joint agencies with as circumscribed powers as the Ohio River Valley Water Sanitation Commission.



**CONCLUSION**

For the reasons stated, it is respectfully submitted that the judgment of the Supreme Court of Appeals of West Virginia should be reversed.

PHILIP B. PERLMAN,  
*Solicitor General.*

OSCAR H. DAVIS,  
*Special Assistant to the Attorney General.*

ALANSON W. WILLCOX,  
*General Counsel,*

GLADYS A. HARRISON,  
*Assistant General Counsel,*

CHARLES M. HENDERSON,

MURRAY STEIN,  
*Attorneys,*

*Federal Security Agency.*

NOVEMBER 1950.

## APPENDIX

### CONSTITUTIONAL PROVISIONS GOVERNING THE INCUR- RENCE OF DEBTS BY THE STATES OF THE OHIO RIVER VALLEY WATER SANITATION COMPACT

#### ILLINOIS

##### Article IV, section 18

\* \* \* *Provided*, the State may, to meet casual deficits or failures in revenues, contract debts, never to exceed in the aggregate \$250,000; and moneys thus borrowed shall be applied to the purpose for which they were obtained, or to pay the debt thus created, and to no other purpose; and no other debt, except for the purpose of repelling invasion, suppressing insurrection, or defending the State in war (for payment of which the faith of the State shall be pledged), shall be contracted, unless the law authorizing the same shall, at a general election, have been submitted to the people, and have received a majority of the votes cast for members of the General Assembly at such election. \* \* \*

#### INDIANA

##### Article X, section 5

No law shall authorize any debt to be contracted, on behalf of the State, except in the following cases: To meet casual deficits in the revenue; to pay the interest on the State Debt; to repel invasion, suppress insurrection, or, if hostilities be threatened, provide for the public defense.

## KENTUCKY

## Section 49

The General Assembly may contract debts to meet casual deficits or failures in the revenue; but such debts, direct or contingent, singly or in the aggregate, shall not at any time exceed five hundred thousand dollars.

\* \* \* Provided, the General Assembly may contract debts to repel invasion, suppress insurrection, or, if hostilities are threatened, provide for the public defense.

## NEW YORK

## Article VII, sections 9, 10, 11

§ 9. The State may contract debts in anticipation of the receipt of taxes and revenues, direct or indirect, for the purposes and within the amounts of appropriations theretofore made. \* \* \*

§ 10. In addition to the above limited power to contract debts, the State may contract debts to repel invasion, suppress insurrection, or defend the State in war, or to suppress forest fires; \* \* \*

§ 11. Except the debts specified in sections 9 and 10 of this article, no debt shall be hereafter contracted by or in behalf of the State, unless such debt shall be authorized by law, for some single work or purpose, to be distinctly specified therein. \* \* \*

## OHIO

## Article VIII, sections 1, 2, 3

§ 1. The state may contract debts to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided

for; but the aggregate amount of such debts, direct and contingent, whether contracted by virtue of one or more acts of the general assembly, or at different periods of time, shall never exceed seven hundred fifty thousand dollars; \* \* \*

§ 2. In addition to the above limited power, the state may contract debts to repel invasion, suppress insurrection, defend the state in war, or to redeem the present outstanding indebtedness of the state; \* \* \*

§ 3. Except the debts above specified in sections one and two of this article, no debt whatever shall hereafter be created by or on behalf of the state.

#### PENNSYLVANIA

##### Article 9, section 4

No debt shall be created by or on behalf of the State, except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the State in war, or to pay existing debt; and the debt created to supply deficiencies in revenue shall never exceed, in the aggregate at any one time, one million dollars: \* \* \*

#### VIRGINIA

##### Sections 184, 184a

§ 184. The general assembly may contract debts to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war.

§ 184a. No debt or liability except the debts specified in section one hundred

eighty-four shall be hereafter contracted by or in behalf of the State, unless such debt shall be authorized by law for some single purpose constituting new capital outlay, to be distinctly specified therein, and a vote of a majority of all the members elected to each house shall be necessary to the passage of such law. \* \* \*

#### WEST VIRGINIA

#### Article X, section 4

No debt shall be contracted by this State, except to meet casual deficits in the revenue, to redeem a previous liability of the State, suppress insurrection, repel invasion or defend the State in time of war; but the payment of any liability other than that for the ordinary expenses of the State, shall be equally distributed over a period of at least twenty years.